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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ALEXANDER L. STEVENS,
CLERK

JOAN B. REDHEAD, individually and as co-executrix of the
Estate of Hugh McCulloch Redhead, deceased, and the
NATIONAL BANK OF DETROIT, co-executor of the Estate
of Hugh McCulloch Redhead, deceased,

Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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December 1, 1982

QUESTION PRESENTED

Whether, under federal law, a Federal Aviation Administration air traffic controller has an independent duty to safeguard the lives of passengers under his control when he knows or should know that the plane is descending in poor visibility close to mountainous terrain—or whether he may simply assume that the pilot is operating in safe conditions and therefore do nothing.¹

¹ The parties below were:

Joan B. Redhead, individually and as co-executrix of the Estate of Hugh McCulloch Redhead, deceased, and the National Bank of Detroit, co-executor of the Estate of Hugh McCulloch Redhead, deceased—plaintiffs and appellants.

United States of America—defendant and appellee.

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No. _____

JOAN B. REDHEAD, individually and as co-executrix of the
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UNITED STATES OF AMERICA,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 686 F.2d 178 and appear in the appendix at 1a. The opinion of the district court is unreported and appears in the appendix at 24a.

THE COURT'S JURISDICTION

The judgment of the court of appeals was entered on August 6, 1982. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 2, 1982.

STATUTES AND REGULATIONS

This Court has jurisdiction to review the court of appeals' judgment pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c) and Rule 20.4 of the Rules of the Supreme Court.

The text of the following relevant statutes and regulations are set forth in the appendix:

Federal Aviation Act of 1958 § 307, Pub. L. 85-726, 72 Stat. 749, 49 U.S.C. § 1348;

Federal Aviation Act of 1958 § 601, Pub. L. 85-726, 72 Stat. 775, 49 U.S.C. § 1421;

Federal Aviation Administration, En Route Air Traffic Control Manual (as revised September 12, 1975).

STATEMENT OF THE CASE

This action was brought by the widow and executors of the estate of Hugh McCulloch Redhead to recover damages under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The action seeks to recover for the negligence of the Federal Aviation Administration that led to the crash of the airplane in which Mr. Redhead was a passenger on September 12, 1975. At the time of the crash into a cloud-covered ridge, the plane was under the control of an FAA air traffic radar controller.²

Most of the facts were stipulated to and are essentially undisputed. On September 12, 1975, Mr. Redhead was a passenger aboard a private corporate aircraft ("Charlie Echo") flying to Nemacolin, Pennsylvania. During an intermediate stop at Pittsburgh, the pilot was told by the FAA's air traffic control weather briefer that there were

² A timely administrative claim was filed on August 19, 1977 with the FAA. After that claim was denied on January 26, 1978, a timely complaint was filed in the United States District Court for the Western District of Pennsylvania. 28 U.S.C. §§ 1332(a), 1346(b), 2401(b), 2671 *et seq.*

low ceilings and poor visibilities existing in the Nemacolin vicinity and that the weather was expected to remain "down." The forecast for the area called for a solid deck of clouds from about 1500 feet Mean Sea Level ("MSL") to 15,000 or 16,000 feet MSL.

Because of these weather conditions, the crew filed a flight plan calling for the plane to fly under FAA Instrument Flight Rules ("IFR") to Nemacolin, which is at an elevation of 2,000 feet MSL.³

Shortly after take-off, the crew received a cruise clearance of 5,000 feet MSL to fly, first, to the Indianhead VORTAC radio navigation facility (about twenty nautical miles northeast of Nemacolin Airport) and, then, to Nemacolin. Under FAA regulations, the plane could not descend below this 5,000 foot MSL altitude unless VFR conditions were present.⁴

During the entire course of the flight, the plane was under the control of the FAA air traffic controller. The controller's radar screen was updated every ten seconds to display the plane's assigned altitude, its actual altitude and its precise location. From the radar screen, the controller was therefore aware that the plane was descending below its assigned 5,000-foot minimum altitude in an

³ A flight may be conducted under one of two different sets of FAA flight rules—Visual Flight Rules (VFR), or Instrument Flight Rules (IFR). FAA regulations permit VFR flight in controlled airspace, the area (above 1200 feet) in which Charlie Echo was operating, only if a pilot has forward visibility of at least three miles and can fly at least 500 feet below, 1,000 feet above, and 2,000 feet laterally from any clouds. 14 C.F.R. § 91.105 (1981). As the majority of the court of appeals noted (686 F.2d at 180 n.1, App. 3a), unless these conditions prevail, the aircraft must be operated pursuant to FAA Instrument Flight Rules, where it is presumed that pilots are unable to see either other aircraft or the ground and therefore are guided by air traffic controllers.

⁴ The Minimum En Route Altitude and the Minimum Obstruction Clearance Altitude for the Nemacolin area are both 5000 feet.

FAA-designated "mountainous area," which the controller knew contained ground obstructions at an elevation of 2,900 feet MSL.

All contemporary weather reports indicated that Visual Flight Rules—conditions did not exist and were not forecast for the area. This fact was specifically confirmed by the pilot of an Army helicopter only three miles away from where Charlie Echo was flying (the minimum distance for VFR horizontal flight visibility), who stated that he could not see Charlie Echo because of the prevailing *IFR* weather conditions. (686 F.2d at 186-87 nn. 6, 7, App. 16a-17a nn. 6, 7).

All indications were that VFR conditions did not exist in the area. Despite the controller's knowledge that pilots occasionally violate VFR minimums, the controller simply assumed that the plane was in VFR conditions based solely on his assumption that the pilot would not have descended below 5,000 feet unless VFR conditions existed. (686 F.2d at 187, App. 18a.)

Because of "recent [radar] controlled flights into the ground"—crashes of airplanes that are under the control of an FAA radar controller—on June 12, 1975, barely three months before Charlie Echo was to crash near Nemacolin, the Director of the FAA issued an explicit order on this subject. That order notified air traffic controllers that they had a "first priority duty," along with the separation of aircraft, to immediately issue a "Low Altitude Alert" to "radar identified aircraft if an automatic altitude report [appearing in the "data block" on the radar screen] is observed on radar showing the aircraft to be at an altitude, which in the controller's judgment places the aircraft in unsafe proximity to terrain/obstructions." (FAA En Route Air Traffic Control Manual ("FAA Manual") ¶ 55A (1975)).

A "first priority duty" is one taking precedence over any other duties a controller may have. And in the case

of a "Low Altitude Alert," such a warning is "more explicit and more definitive than just a mere judgment call," since its purpose is to advise the crew of an aircraft that, for whatever reason, the controllers, have observed that airplane to be in a dangerous situation and it should climb immediately.

As the plane in which Mr. Redhead was a passenger was flying toward Nemacolin just before noon on September 12, 1975, the radar controller's screen showed the plane descending below the minimum 5,000 foot IFR cruise clearance altitude (which was also the Minimum En Route Altitude and the Minimum Obstruction Clearance Altitude). The radar controller was aware that there were ground obstructions in the area at elevations of 2,900 feet MSL.

At 1555:29 GMT (11:55:29 local time)—less than two minutes after the radar controller told the helicopter that Charlie Echo had descended below the minimum 5,000 foot altitude to 4,100 feet and the helicopter reported he could not see the plane—the controller asked:

847CE what are your intentions? ⁵

The plane was still descending. The radar controller asked this question because he wanted to find out whether Charlie Echo wished to cancel its cruise clearance—which could only be done if the plane was actually in VFR conditions—"and a concern about how he was going to do it," i.e., "whether or not he was flying in VFR." The radar controller's concern was understandable in view of his knowledge that the weather at all of the closest reporting stations was IFR (even if he did not understand what the helicopter pilot had told him two minutes earlier about it).

⁵ This inquiry indicated that the radar controller was still providing radar services, i.e., he was still in radar control of the plane.

After hesitating for twelve seconds, at 1555:41 GMT the plane replied:

We just take a look we're gettin' some ground contact here and I think we're gonna make it but ah just stand by with us and we'll give ya a call here in a minute.

The automatic altitude readout on the "data block" on the controller's radar screen indicated that Charlie Echo was descending through an altitude of 3,400 and down to about 3,100 feet—a bare 200 feet above the 2,900-foot ground obstructions in the area. Despite his earlier concern and his knowledge about the terrain and the weather in the area, the radar controller simply assumed that the plane was in VFR conditions on the theory that otherwise it would not have descended to this altitude.

The controller did nothing. The plane's descent continued to be depicted on the controller's screen and "data block" readout for approximately three more minutes until radar contact was lost at an altitude of roughly 2,800 feet.

The plane was found a day later. It had crashed into trees and then into the ground at an elevation of approximately 2,700 feet MSL. All of the occupants, including Mr. Redhead, were killed in the crash.⁶

The FAA's En Route Air Traffic Control Manual states in no uncertain terms that an air traffic controller is required to

[b]ecome familiar with pertinent weather information when coming on duty and stay aware of current weather information needed to perform air traffic control duties.

⁶ Toxicological tests and post mortem examination of the two pilots disclosed nothing that could have contributed to the cause of the accident. A post-accident examination of the plane's engines also revealed no pre-impact malfunction or mechanical failure.

FAA Manual ¶ 78. To accomplish this, a controller is also required to

[s]olicit PIREP weather reports from pilots when one or more of the following conditions exist or are forecast for the area:

- (1) Ceilings at or below 500 feet.
- (2) Visibility (surface or aloft) at or less than 5 miles.

• • •

FAA Manual ¶ 81.

Both of these two weather conditions were present in the area where Charlie Echo was flying on September 12, 1975.

A radar controller is also required by the En Route Air Traffic Control Manual to give a "first duty priority" to protecting aircraft from being "in unsafe proximity to terrain/obstructions." The Manual's provisions are quite explicit; a radar controller is required to,

[i]mmediately issue a low altitude alert to a radar identified aircraft if you observe an automatic altitude report on radar showing the aircraft to be at an altitude, which in your judgment, places the aircraft in unsafe proximity to terrain/obstructions.

Phraseology:

(Ident) LOW ALTITUDE ALERT, ADVISE YOU CLIMB IMMEDIATELY.

FAA Manual ¶ 55A.

The district court ruled that the controller "was entitled to assume that the pilot was in command of the situation and was operating the aircraft in accordance with [FAA] regulations." 686 F.2d at 180, App. 2a.

On appeal, over a vigorous dissenting opinion, a two-judge majority of the court of appeals affirmed. The dissent stated that

the district court's failure to apply, or even to recognize, the principle of concurrent duties of care led to clearly erroneous findings of fact. I would reverse on the ground that the controller had a duty to issue a low altitude alert to the plane which he did not discharge.

686 F.2d at 184, App. 11a. And further:

the controller was negligent because he failed to discharge his duty to issue a low altitude alert to the plane as it descended. The controller had a duty to warn, established by the *Controller's Manual*, because under the circumstances he was not entitled to assume that the plane's pilot was obeying the visual flight rules.

686 F.2d at 189, App. 22a.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEALS HOLDING THAT AIR TRAFFIC CONTROLLERS HAVE AN INDEPENDENT DUTY TO SAFEGUARD THE LIVES OF AIRPLANE PASSENGERS

This Court has never passed upon the duty owed airplane passengers by the Federal Aviation Administration's air traffic controllers.

Every recent court of appeals decision—apart from the decision below—has held in no uncertain terms, however, that FAA air traffic controllers have a duty that is *independent of and concurrent with* the responsibility of pilots to see that the lives of aviation passengers are not endangered. See, e.g., *Rudelson v. United States*, 602 F.2d 1326 (9th Cir. 1979); *Mattschei v. United States*, 600 F.2d 205, 208 (9th Cir. 1979); *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977) (per curiam); *In re Air Crash Disaster v. United States*, 544 F.2d 270 (6th Cir. 1976); *Freeman*

v. United States, 509 F.2d 626 (6th Cir. 1975); *Ingham v. Eastern Air Lines*, 373 F.2d 227 (2d Cir.), cert. denied sub nom. *United States v. Ingham*, 389 U.S. 931 (1967); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970); see also *Himmler v. United States*, 474 F. Supp. 914, 942-43 (E.D. Pa. 1979).⁷

That the other circuits have reached a conclusion at odds with the panel majority—but in agreement with the dissent—here is itself a sufficient reason for granting the writ.

AN AIR TRAFFIC CONTROLLER'S DUTY TO SAFEGUARD THE LIVES OF PASSENGERS IS A MATTER OF OVERRIDING FEDERAL IMPORTANCE THAT THIS COURT HAS NOT ADDRESSED

Under the Federal Tort Claims Act, the liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b). Where the acts or omissions of the Federal Aviation Administration or its employees are in issue, however, it is essentially federal law that will govern—since, as often as not, it is the FAA's own regulations that establish the minimum duty of care.

By the same token, the federal courts have exclusive jurisdiction to decide cases involving the FAA's failure to protect the lives of air travelers. 28 U.S.C. § 1346(b). As a result, virtually every case involving the FAA's duty of care has arisen—and will continue to arise—in the federal courts. This is, of itself, a compelling reason for this Court to consider and determine the applicable federal standard governing the FAA's statutory duty to insure the safety of aircraft and air passengers.

⁷ As the Court stated in *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963),

[i]nsofar as [a district court's] conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law.

Each year, there are approximately 4,000 airplane accidents in the United States. Since 1975, more than 10,000 people have died, and more than 10,000 more have been injured in aviation accidents.⁸

Section 307(c) of the Federal Aviation Act of 1958 states in no uncertain terms that the Administrator of the FAA is "directed to prescribe air traffic rules and regulations . . . for the . . . protection . . . of aircraft."⁹ Section 601 of that Act provides in equally unequivocal terms that "[t]he Administrator is empowered and it shall be his duty to promote safety of civil aircraft in air commerce . . ."¹⁰

As the dissent below emphasized,

[t]he negligence of a pilot is not imputed to his or her passengers. *Pierce v. United States*, [679 F.2d 617 (6th Cir. 1982)] *supra*, at 622. The controller's duty is to convey all information and give all warnings specified by Federal Aviation Administration manuals, and to 'take steps beyond those set forth in the manuals if such steps are necessary to ensure the safety of pilots and passengers' in emergency or especially hazardous situations. *Rudelson v. United States*, *supra*, 602 F.2d at 1329. *Accord, Hartz v. United States*, 387 F.2d 870, 873-74 (5th Cir. 1968); *Himmler v. United States*, 474 F. Supp. 914, 931 (E.D. Pa. 1979). A controller may have a duty to act even if the emergency arises from a pilot's failure to comply with FAA regulations.

686 F.2d at 185, App. 12a; *see also Himmler v. United States*, 474 F. Supp. 914 at 930 (E.D. Pa. 1979):

While it is certainly true that a pilot is in control of his airplane [citations omitted], and the con-

⁸ U.S. Bureau of the Census, Statistical Abstract of the United States: 1981, Table 1065 at 614 (1981).

⁹ Pub. L. 85-726, 72 Stat. 749, 49 U.S.C. § 1348(c).

¹⁰ Pub. L. 85-726, 72 Stat. 775, 49 U.S.C. § 1421(a)(6).

troller can't fly it for him, it does not mean that a controller cannot also be negligent in his handling of the pilot and the situation at hand. The standard of care in aviation cases has been held to be concurrent, and responsibility rests upon both the pilot and [the controller].

In addition to the requirements of any applicable federal regulations,

[t]he air traffic controller is required to give all information and warnings specified in his manuals, and in certain situations he must give warnings beyond the manuals. This duty to warn is based on the simple tort principle that once the Government has assumed a function or service, it is liable for negligent performance.

Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972).

These principles take on added force where an airplane is flying in Instrument Flight Rules ("IFR") weather conditions, since the plane and its passengers are truly under the "control" of the FAA's radar controller. *Yates v. United States*, 497 F.2d 878, 883 (10th Cir. 1974) ("For all practical purposes, he was in [the] complete control of the tower.").

In a similar case (also involving an IFR cruise clearance, questionable weather and a crash into a mountain ridge), the federal courts had no difficulty in concluding that the air controller had been negligent:

[I]t should have been reasonably apparent to the ATC [air traffic controller] that the Cheaha Mountain, the highest terrain in the entire area and obscured by weather, was in the vicinity of 8124Y, and that the pilot could not safely descend at his discretion. Though the presence of the terrain and the potential danger it presented should have been equally obvious to Todd [the pilot] in the exercise of due care, ATC nevertheless had a duty to warn

Todd . . . that he was in the vicinity of Cheaha Mountain and a descent might prove dangerous. Failure to issue this warning constituted negligence on the part of the United States.

Todd v. United States, 384 F. Supp. 1284, 1292 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977) (per curiam).

Here, not only did all of the reported weather information indicate that IFR, rather than VFR, weather conditions were present in the area of Charlie Echo's flight, but the pilot of the Army helicopter told the radar controller the same thing at the same time the controller knew that Charlie Echo, just three miles away, was already at 4,100 feet, well below the minimum IFR altitude of 5,000 feet.

As the court noted in *Stork v. United States*, 430 F.2d 1104, 1108 (9th Cir. 1970), "[a]ny assumptions on which deference to the judgment of the pilot can normally rest were refuted by the events themselves." See also *Furumizo v. United States*, 245 F. Supp. 981, 992 (D. Haw. 1965) (even where prior warning had been given and regardless of what the controller "thought well-trained pilots generally ought to know," the controller still had a duty to warn of an extremely hazardous act).

In sum, whether or not the pilots of the aircraft were negligent—the unstated but basic rationale for the two-to-one court of appeals decision—is irrelevant to the fundamental issue here: was the FAA radar controller negligent in failing to verify with Charlie Echo if the plane was in VFR conditions and failing to give the required Low Altitude Alert directing the plane to climb immediately? *Rudelson, supra*, 602 F.2d at 1330.

As a matter of overriding federal law the answer to this question should be "yes." Airplane passengers are entitled to place a "heavy degree of reliance . . . upon the government for insuring the safety of their flights"

in view of the "high stakes involved." *Himmeler, supra*, 474 F. Supp. at 942, quoting from *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 235-36 (2d Cir. 1967). Because of these dangers,

. . . [w]hat might be held to meet the standard of ordinary care in some different situations does not necessarily measure up to ordinary care in an air traffic control room where . . . there is always the possibility that tragic accidents may occur in a matter of seconds if controllers who assume a high responsibility, relax from constantly overseeing an aircraft to promote its safety in flight.

Hennesey v. United States, 12 CCH Aviation Law Reports 17,410, 17,418 (N.D. Cal. 1971).

The provisions in the FAA's En Route Air Traffic Control Manual plainly specify that the radar controller here had a duty to inquire of Charlie Echo as to the weather it was encountering—and then to give a Low Altitude Alert to climb immediately once the controller ascertained that the plane was not in VFR conditions. The evidence is uncontradicted that the radar controller responsible for insuring the safety of Charlie Echo's passengers, including Mr. Redhead, did nothing.

Even apart from the conflict between the two-to-one opinion below and the decisions of other courts of appeals, this case squarely presents a matter of federal law having the utmost importance to the lives and safety of the hundreds of thousands of airplane passengers each year who are under the direct control of the FAA and its air traffic controllers. As Judge Becker underscored in his dissent:

My concerns about the majority's disposition of this case transcend my belief that this case is wrongly decided. The standards of conduct for air traffic controllers are high because the safety of air travelers demands it. . . . Because the Government, through air traffic control, has undertaken to pro-

mote safe air travel, pilots and especially passengers are entitled to rely on controllers' full performance of their exacting duties. . . . That assistance was not given to the pilot here, and the result was tragic for the completely innocent passengers as well as for the apparently negligent pilot.

686 F.2d at 189, App. 22a-23a.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 1, 1982

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 81-2625

JOAN B. REDHEAD, Individually and as Co-Executrix of
the Estate of Hugh McCulloch Redhead, Deceased, and
the NATIONAL BANK OF DETROIT, Co-Executor of the
Estate of Hugh McCulloch Redhead, Deceased,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 78-0800)**

Argued April 26, 1982

Before: ALDISERT, WEIS and BECKER, *Circuit Judges*

Opinion filed August 6, 1982

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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs sued the government under the Federal Tort Claims Act, 28 U.S.C. § 2671, alleging that an airplane crash was caused by the negligence of an air traffic controller in failing to direct the pilot of the plane to proceed to a safe altitude rather than allowing him to attempt a landing under marginal weather conditions. The district court held that, under the circumstances, the controller was entitled to assume the pilot was in command of the situation and was operating the aircraft in accordance with Federal Aviation Administration regulations. Accordingly, judgment was entered for the defendant. We will affirm.

The complaint in the district court alleged that their decedent, Hugh Redhead, was killed in the crash and that the government was liable in damages. After a bench trial, the district judge absolved the government of negligence.

Plaintiffs' decedent was a passenger in a private plane that crashed into Sugarloaf Mountain near Nemacolin, Pennsylvania, on September 12, 1975, killing the pilot,

co-pilot and the two passengers. The aircraft was a twin-engine turboprop equipped with radio navigational equipment, including that necessary for travel under instrument flight rules (IFR).¹ The pilot and co-pilot were well qualified, each having more than forty-eight hundred hours of flight time. Both had flown into the Nemacolin Airport on two occasions before the accident.

The plane left the Pittsburgh Airport at 11:38 a.m. for its destination at Nemacolin, a short distance away. According to the briefing the crew received before takeoff, the weather was generally poor, although improving, with low ceilings and low visibility within the area of the five weather reporting stations closest to Nemacolin.

The Nemacolin Airport is uncontrolled and does not have an FAA-approved instrument approach procedure. The ground elevation at the airport is 2,000 feet above sea level and the surrounding mountainous area has peaks of 2,900 feet.

After leaving the Pittsburgh airport, the plane flew under instrument flight rules and was in radar contact with an air controller located in Cleveland, Ohio. Approximately nine minutes after takeoff, the crew requested and received a cruise clearance of 5,000 feet mean sea level, telling the controller, "we'll take a look at Nemacolin and, ah, let you know."

¹ The flight of general aviation aircraft may be conducted under either one of two different sets of flight rules—visual flight rules (VFR), or instrument flight rules (IFR). Under VFR, a pilot directs his aircraft according to what he can see, navigating from place to place according to visual cues outside his aircraft. Under IFR, it is presumed that pilots are unable to see either other aircraft or the ground and are guided by air traffic controllers. A pilot flying under IFR must file an IFR flight plan, indicating his destination, proposed route of flight and requested altitude. Control of the aircraft is maintained by reference to various instruments on board, and navigation is accomplished through various electronic navigational aids, which receive and interpret data broadcast from ground stations.

A cruise clearance is not discretionary; it must be issued by an air controller upon request. The cruise clearance authorized the plane to fly at 5,000 feet and would permit the pilot to descend below that altitude to land only if visual flight rule conditions prevailed. FAA regulations provide that once a cruise clearance is granted, the pilot reserves a block of air space up to the limit specified in the clearance. Once the pilot "reports" leaving that altitude in the block, he may not return to it without air traffic controller clearance.

Immediately after the air controller granted the cruise clearance, an army helicopter reported that it could not see plaintiffs' plane, which was then about eight miles away. A minute later the controller told the helicopter that the plane was now at 4,100 feet on a cruise clearance, and they were about three miles apart.

At 11:55, three minutes after the cruise clearance had been granted, the decedent's aircraft descended to approximately 3,400 feet. As the air traffic controller observed this on the altitude data block on his radar screen, he radioed the pilot "what are your intentions?" The crew replied, "We just tak'n a look [W]e're getting some ground contact here, and I think we're gonna make it. But, uh, just standby with us, and, uh, we'll give you a call here in a minute." A few seconds later one of the crew told the controller "if we, uh, we lose radio contact with you and we make the AP, the landing ok, I've got an eight hundred number to call to cancel it [the flight plan]." The plane continued its gradual descent until 11:56 when it leveled off at about 2,600 feet. Two minutes later the controller lost radar contact with the plane. The next day the plane was found; it had crashed into the hillside at approximately 2,600 feet above sea level.

According to FAA regulations, an air traffic controller is required to issue a "low altitude alert" to radar-identified aircraft if, in the judgment of the controller, radar shows the aircraft to be in an unsafe proximity

to terrain or obstructions. However, information about the terrain is not displayed on the radar screen, nor does it indicate most weather conditions or whether the pilot is flying under instrument or visual flight rules.

The trial court found that the controller was not required to affirmatively solicit weather information from the plaintiffs' plane to determine if it was flying in visual flight conditions. Since the plane had left its assigned 5,000 feet altitude, and the crew knew that they could not descend unless they were in visual flight circumstances, the controller was entitled to assume that the aircraft was operating under VFR. The descent was normal and the transmissions from the crew were made in a calm manner, not indicating any anxiety or fear. The pilot did not "report" his change of altitude and, therefore, was free to return to 5,000 feet without prior permission.

The radio message that they were getting some ground contact was found by the court to be an indication that the crew was able to glimpse the ground through occasional breaks in the clouds. There was no finding whether there was sufficient visibility to operate under visual flight rules.

The trial court concluded that because the plane's flight path did not exhibit any significant or extreme deviations from what normally would be expected during a descent, the controller did not have a duty to issue a low altitude alert. The controller was aware that the region was mountainous, but that fact would not have prevented a safe landing in VFR conditions, which the controller reasonably expected was the situation in this case. The court concluded that there was no negligence on the part of the controller.

Plaintiffs appeal on the grounds that the controller was not entitled to assume that the crew was obeying the regulations at the time of the descent, so that he was

negligent as a matter of law in not soliciting a weather report from the plane and for not issuing a low altitude alert. Plaintiffs also allege trial court error in the refusal to receive deposition testimony of the controller, denial of an amendment to the complaint, and allowance of certain hypothetical questions.

Both the pilot and the air traffic controller owe a duty of care to passengers in an airplane. Negligence by the pilot does not, in and of itself, absolve the government of liability. Each is responsible for the safe conduct of the aircraft and the safety of its passengers. See *Rudelson v. United States*, 602 F.2d 1326 (9th Cir. 1979); *Dickens v. United States*, 545 F.2d 886 (5th Cir. 1977); *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972). Thus, there may be concurrent liability.

The pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation. *In re Air Crash Disaster at New Orleans (Moisant Field)*, 544 F.2d 270 (6th Cir. 1976). He must be aware of those facts which are material to its proper operation and is charged with that which he should have known in the exercise of the highest degree of care. *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969).

Tower personnel and air traffic controllers are often a source of vital information. If there is negligence on the part of such persons, it must have a causal relationship to the happening of the accident—in other words, their conduct must be a proximate cause. *DePriest v. Kooiman*, 379 Mich. 44, 149 N.W.2d 449 (1967).²

In this case, as in most negligence litigation, factual issues predominate. While the nature and extent of the duty of due care is a question of law, in reviewing the

² The district court applied the general negligence law of Michigan based upon Ohio's conflict of law principles. This is not disputed on appeal and will not be discussed.

district court's decision we are bound to sustain the factual findings unless they are clearly erroneous. *Rudelson v. United States*, 602 F.2d at 1329.

Plaintiffs' theory of liability essentially is that either by soliciting weather information from other pilots or by interrogating the crew of the aircraft, the controller should have learned what the conditions were in the precise area where the plane was descending. With that knowledge, plaintiffs argue, the controller would or should have ordered the pilot to return to or remain at the safe 5,000 feet altitude.

The record does not support plaintiffs' contention. As the district court found, the fact that the weather in the general area was poor did not preclude the possibility of better conditions at a particular location, which would permit a pilot to use visual flight rules. Plaintiffs did not identify any sources, other than the decedent's plane, through which the controller could determine precise weather conditions in that immediate area. The controller testified that he did not have weather information at his disposal, other than the report of poor visibility by the army helicopter that was flying in the same general area as decedent.

The record shows that the weather conditions were caused by a slow-moving cold front which was traveling in a southeasterly direction through the area. The plane, flying in the same southeasterly direction, was therefore approaching the weather conditions from the backside, rather than heading directly into it. The crew reported getting some ground contact, indicating that there were breaks in the clouds rather than a solid overcast as the plane approached Nemacolin.

Plaintiffs' expert testified that this message would lead him to believe that the plane was not proceeding in compliance with visual flight regulations. The government's expert, an air traffic controller specialist, testified

to the contrary that he would assume that the pilot was conducting the flight according to regulations in visual flight conditions and that he would "probably [be] breaking out underneath whatever weather that might have been there at the time and breaking [sic] down so that he could safely proceed to and land at his destination."

The controller who monitored the flight testified that "[t]he man seemed to be handling his craft well. His conversation indicated to me that he had everything under control. I had no reason to [give a low altitude alert] from where I was sitting." The controller said that he would not have expected the pilot to make the transmission about ground contact if he were in instrument flight conditions and, furthermore, that the pilot was required to contact the controller if he could not comply with the clearance.

Assessing the testimony of the witnesses in this case depends largely upon their credibility. Although the plaintiffs' expert was helpful to their cause, the controller and the government's experts made out a case of non-liability which persuaded the trial judge. In circumstances like these, the appellate court must extend great deference to the superior ability of the trial judge to determine where lies the believable evidence.

Plaintiffs contend that the controller should have solicited weather reports (PIREPS) from the decedent's plane and other pilots in the area, so as to become familiar with the situation at Nemacolin.⁸ But there is nothing in the record to indicate that any such information would have been of value in the situation that existed here, since the weather was variable in specific locations. The people who were best informed about the weather at the critical area were the crew members of

⁸ The FAA manual requires that such information be solicited when certain weather conditions exist, and it is then passed on to aircraft approaching the area.

the plane. The controller had a right to assume that, in the absence of evidence to the contrary, conditions there were such that the aircraft could operate under visual flight rules. He could expect that out of concern for their own lives, if for no other reason, the crew members were flying in conformance with FAA regulations.

The pilot of an aircraft is in command of the flight. The controller, at some distant point, has the duty to aid and assist the crew and furnish whatever information he has that would be helpful. But decisions that depend upon conditions known in detail only by the pilot must be made by him. *See Spaulding v. United States*, 455 F.2d at 226-27; *American Airlines, Inc. v. United States*, *supra*.

The cases where the controller has superior knowledge of weather conditions are not applicable here. This was not an emergency situation or one where the controller failed to inform or warn the pilot of a sudden change in the weather. *Martin v. United States*, 586 F.2d 1206, 1209-10 (8th Cir. 1978); *Delta Air Lines, Inc. v. United States*, 561 F.2d 381, 397 (1st Cir. 1977), cert. denied, 434 U.S. 1064 (1978). *See also Hinmller v. United States*, 474 F.Supp. 914, 923-26 (E.D. Pa. 1979). In variable conditions such as existed here, the pilot could well have found visibility sufficient to land once he descended. *See In re Air Crash Disaster at New Orleans (Moisant Field)*, 544 F.2d at 278.

The controller was in no better position to inform the pilot about the weather than the pilot was himself. It is not negligence not to repeat information already given or that is already known to the pilot. *Spaulding v. United States*, 455 F.2d at 227. When the pilot decided to go below 5,000 feet, he reserved the right to return to that altitude if he did not find adequate visual conditions to proceed. It is the pilot's duty to keep the visual flight minimums necessary for a visual approach landing, and

if he encounters conditions below prescribed minimums, he must execute a missed approach. *American Airlines, Inc. v. United States*, 418 F.2d at 189-90.

In view of these general principles and the factual findings, which were not clearly erroneous, we cannot say that the trial judge erred as to the ultimate finding that negligence may be not ascribed to the government here.

Plaintiffs also contend that the trial judge erred in denying them permission to amend the complaint so as to charge the FAA with negligence in the supervision, training, and evaluation of air traffic controllers. The motion was denied at a pretrial conference, the judge noting that the proposed amendment would require reopening of discovery and would be unfair to the defendant. The case had been pending for some years and the plaintiffs had had ample opportunity to amend before pretrial. The trial judge did not abuse his discretion in denying the motion which would have delayed the projected trial date. Moreover, as the factual record demonstrates, the proffered amendment would not have served to establish the proximate cause of the crash in any event.

Plaintiffs also complain that the court erred in refusing to allow portions of the air controller's deposition taken during discovery to be read into evidence during trial. The judge pointed out that the controller was in the courtroom, available to testify in person. We find no error in the trial judge's ruling, since there were no unique procedural circumstances present which dictated that portions of the deposition be used instead of live testimony. If indeed there was any error, it was harmless because the controller testified in full about his part in the ill-fated flight.

Finally, plaintiffs argue that the trial judge erred in permitting the defense to pose hypothetical questions

without proper record bases. If there was any error in the trial judge's rulings, it was harmless error at most.

There being no reversible error, we will affirm the judgment of the district court.

BECKER, Circuit Judge, dissenting.

The majority affirms primarily because it agrees with the district court that, on the facts of this case, the air traffic controller fully discharged his duty to the passengers by relying on the pilot to obey the visual flight rules. The majority acknowledges that pilots and controllers have concurrent duties of care, *see Pierce v. United States*, No. 81-5015, slip op. at 7-8, 10 (6th Cir. May 27, 1982); *Mattschei v. United States*, 600 F.2d 205, 208 (9th Cir. 1979), but ignores that principle as it reviews the district court's findings of fact and conclusions of law. The majority asks whether the district court's findings are clearly erroneous and has no difficulty concluding that they are not, but never asks whether the district court applied an erroneous legal standard. I disagree then with the majority's approach to the question of the controller's negligence.¹ In my opinion, the district court's failure to apply, or even to recognize, the principle of concurrent duties of care led to clearly erroneous findings of fact. I would reverse on the ground that the controller had a duty to issue a low altitude alert to the plane which he did not discharge.²

¹ I agree with the majority that appellants' contentions about their effort to amend their complaint and certain evidentiary rulings at trial do not warrant reversal.

² "[I]n most cases where the trial judge has erred in determining what standard of conduct should have been used in a negligence determination, . . . the ultimate finding as to negligence does not pass muster under the 'clearly erroneous' test." *Miller v. United States*, 587 F.2d 991, 994-95 (9th Cir. 1978).

I.

The majority sets out most of the important facts in its opinion, but the record cannot be properly evaluated without a much fuller explanation of the governing standards of conduct than the majority gives. The majority states correctly that pilots and controllers “[e]ach [are] responsible for the safe conduct of the aircraft and the safety of its passengers,” majority op., typescript at 5, but does not explore the meaning of concurrent duties of care, which are independent duties. Consequently, I must do so.

Pilots are the final authority over and bear ultimate responsibility for the operation of their aircraft, as the majority emphasizes, but the pilot’s responsibility does not abrogate the controller’s duty of care. The negligence of a pilot relieves a negligent controller of liability only if the pilot or the pilot’s representative is the plaintiff and if contributory negligence is a complete defense. *See Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975), *aff’d*, 553 F.2d 384 (5th Cir. 1977) (per curiam); *cf. Rudelson v. United States*, 602 F.2d 1326, 1331-32 (9th Cir. 1979) (applying California law of comparative negligence). The negligence of a pilot is not imputed to his or her passengers. *Pierce v. United States*, *supra*, slip op. at 10. The controller’s duty is to convey all information and give all warnings specified by Federal Aviation Administration manuals, and to “take steps beyond those set forth in the manuals if such steps are necessary to ensure the safety of pilots and passengers” in emergency or especially hazardous situations. *Rudelson v. United States*, *supra*, 602 F.2d at 1329. *Accord, Hartz v. United States*, 387 F.2d 870, 873-74 (5th Cir. 1968); *Himmler v. United States*, 474 F. Supp. 914, 931 (E.D. Pa. 1979). A controller may have a duty to act even if the emergency arises from a pilot’s failure to comply with FAA regulations. This obligation is made clear by the aviation cases already

cited and by Michigan law, which applies to the decision of this case.³ Under the Michigan "emergency doctrine," the controller is not required to anticipate pilot negligence but has a continuing duty to exercise reasonable care under the circumstances, which may require action when a reasonably prudent person would recognize impending danger. See *DePriest v. Kooiman*, 379 Mich. 44, 149 N.W.2d 449, 451 (1967) (per curiam) (duties of automobile driver with right of way); *Noyce v. Ross*, 360 Mich. 668, 104 N.W.2d 736, 741-42 (1960) (same).

II.

In this suit by the estate of a passenger, the conduct of the pilot is at issue only as it relates to the information available to the controller while the plane descended toward Nemacolin Airport. Whether the controller was negligent ultimately depends on his right to assume that the pilot of the plane in which appellants' decedent was a passenger could see his path clearly as the plane descended. If the controller was entitled to make this assumption, it was because a reasonable person would not have known or suspected that the pilot was not obeying the visual flight rules ("VFR").⁴ But if a

³ Under the Federal Tort Claims Act, the state law that would apply to determine the liability of "a private individual under like circumstances" applies to determine the liability of the Government. 28 U.S.C. § 2674 (1976). The district court held that Ohio's choice of law rules required the application of Michigan's negligence law. App. at 39, ¶ 2. The appellants do not contest this ruling.

⁴ FAA regulations permit VFR flight in controlled airspace only if a pilot has forward visibility of at least three miles and can fly at least 500 feet below, 1,000 feet above, and 2,000 feet laterally from any clouds. 14 C.F.R. § 91.105 (1982). Only if VFR conditions are present may plane descend from its assigned cruise clearance altitude toward a destination airport that, like Nemacolin Airport, has no approved instrument approach procedure. Federal Aviation Admin., U.S. Dep't of Transportation, En Route Air Traffic Control, No. 7110.9D, at ¶ 32 (Jan. 1975) [hereinafter cited as "Controller's Manual"].

reasonable person would have known or suspected differently, then the controller had a duty to warn the pilot that he was dangerously low by issuing a low altitude alert. For the reasons set out below, I conclude on the basis of the record that the controller did have this duty and that he is not absolved of responsibility by the pilot's apparent disregard of the rules for VFR flight.

The district court's contrary conclusion rests on an erroneous construction of the scope of a controller's duties. The district court held as a matter of law that the controller's duty was primarily to provide separation among aircraft; that he had no duty to inquire whether the plane was descending in VFR conditions; and that he had no duty to issue a low altitude alert at any time during the descent. App. at 39-40, ¶¶ 5, 8-9. The district court made two critical findings of fact: a controller "is entitled to assume that a pilot is observing Federal Air Regulations,"⁸ and the controller in this case was entitled to assume that the plane was descending under VFR conditions "because it descended and its crew would have known that they could not descend unless they were in VFR conditions according to Federal Air Regulations." *Id.* at 36-37, ¶¶ 71-72. The majority agrees with the district court, concluding that

[t]he controller had a right to assume that, in the absence of evidence to the contrary, conditions there were such that the aircraft could operate under visual flight rules. He could expect that out of concern for their own lives, if for no other reason, the crew members were flying in conformance with FAA regulations.

Majority op., typescript at 8.

⁸ Although the district court characterized this assertion as a "finding," it is plainly reviewable as a conclusion of law because the scope of an air traffic controller's duty of care is a legal question. *Rudelson v. United States, supra*, 602 F.2d at 1329.

The principles enunciated by the district court misstate the law. A controller is entitled to assume pilot adherence to the regulations only until he or she should know that the assumption is unwarranted; a controller has a continuing duty to exercise due care under the circumstances. See *Rudelson v. United States*, *supra*, 602 F.2d at 1329; *Noyce v. Ross*, *supra*, 104 N.W. 2d at 741-42. The district court also misapprehended the law with respect to the controller's duty to issue low altitude alerts. Contrary to its conclusion that the controller's primary duty was to separate aircraft, the *Controller's Manual* instructs a controller to give "first priority" not only to separating aircraft but also to issuing low altitude alerts "to radar identified aircraft if an automatic altitude report is observed on radar showing the aircraft to be at an altitude, which in your judgment, places the aircraft in unsafe proximity to terrain/obstructions." *Controller's Manual*, *supra* note 4, at ¶ 55 (as amended June 2, 1975). Discharge of this duty requires more than a judgment call:

[A]n awareness of significant or extreme deviations can, in respect to terrain and obstructions, be expected on a reasonable, though intermittent basis. In each case conditions of workload, impact of the volume of traffic, the quality/limitations of radar, etc., will be the basis along with the time or persistence of the deviation, for determining reasonableness . . . [T]his paragraph does not impose a duty to see the development of such situations; it does require, however, that when such a situation is observed, the pilot be so advised.

Id. at ¶ 55A. Even the Government's expert testified that, in the circumstances of this case, a controller would have a duty to issue a low altitude alert if he or she received information that a plane was not in VFR conditions. App. at 290.

III.

Viewed in light of the proper standard of conduct, the record demonstrates that the district court's finding that the controller was entitled to assume that the plane was descending in VFR conditions was clearly erroneous. The controller should have known from the information available to him that the plane probably was not in VFR weather. Weather conditions within the area of the five weather stations closest to Nemacolin Airport were generally poor, with low ceilings and poor visibility. The radio transmissions to and from the controller, reproduced in the margin,⁶ show that, five minutes before the

⁶ In this transcript, time is Greenwich Mean Time; "PIT R" is the controller; "847 CE" and "Charlie Echo" are appellants' defendant's plane; and "930" is the army helicopter.

- 1552:23 PIT R Eight four seven Charlie Echo has traffic twelve o'clock, about ten miles, northwestbound at six thousand, it's a army helicopter.
- 1552:33 847 CE Alright, sir, uh, how about five thousand cruise clearance here, we'll take a look at Nemacolin and, uh, let you know.
- 1552:40 PIT R Eight four seven echo, you're cleared to cruise five thousand.
- 1552:43 847 CE Charlie Echo's cleared to cruise five thousand.
- 1552:46 PIT R Army one five nine three zero, traffic twelve o'clock, and about eight miles southeastbound, at five thousand, and with a cruise clearance for an approach.
- 1552:57 930 And, helicopter one five nine three zero, no joy, you have us in radar contact yet?
- 1553:02 PIT R Uh, one five nine three zero, affirmative. You're in radar contact five miles southeast of Indian-head.
- 1553:06 930 Nine three zero, Roger, thank you.
- 1553:47 PIT R Army one five nine three zero. The traffic is now off your, uh, ten o'clock position, about three miles.

crash, the pilot of an army helicopter three miles from the plane reported that he could not see the plane ("no joy") and that he was flying in instrument weather ("India Mike Charlie").⁷ Less than two minutes later the

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- 1553:52 930 This is helicopter one five nine three zero, Roger.
I'm India Mike, uh, Charlie, no joy.
- 1553:58 PIT R Roger, He's out of fortyone hundred now, on a cruise clearance.
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- 1555:29 PIT R Eight four seven Charlie Echo, what are your intentions?
- 1555:33 847 CE We just tak'n a look we're getting some ground contact here, and I think we're gonna make it. But, uh, just standby with us, and, uh, we'll give you a call here in minute.
- 1555:41 PIT R Charlie Echo, Roger.
- 1555:45 847 CE (Garble) We're able (garble) get it and we miss the contact. I got an eight hundred number to call flight service. I'll get 'em on the phone thataway.
- 1555:52 PIT R Uh, Charlie Echo, say again.
- 1555:54 847 CE Yeah, if we, uh, we lose radio contact with you and we make the AP, the landing OK, I've got an eight hundred number to call to cancel it.
- 1556:00 PIT R Charlie Echo, Roger, thank you.
- 1556:15 PIT R Point out is going to go in to Nemacolin, I don't know if he might come down around your area or not.
- 1556:19 ? Alright, I'll watch him.
- 1556:20 PIT R 'K.
-
- 1558:55 PIT R Eight four seven Charlie Echo, radar contact is lost.

App. at 208A-208D.

⁷ The controller testified that the expression "no joy" used by the army helicopter meant that the latter could not see the plane, but that he did not learn until later that the expression "India Mike Charlie" indicated instrument meteorological conditions. App. at 72-73.

radar screen data block⁸ indicated that the plane had descended to 3,400 feet, and the controller asked the plane, "What are your intentions?" The pilot replied, "We just takin' a look, we're getting some ground contact here and I think we're gonna make it, but, uh, just stand by with us and, uh, we'll give you a call here in a minute." The controller testified that this reply told him that the plane was operating in VFR conditions "[b]ecause he left 5,000, and under the cruise clearance you do not leave an altitude unless you have the necessary VFR minimum." In response to a question from the court, the controller acknowledged: "I don't know he was in VFR. That is something I assumed because he descended." App. at 74-75. He also testified, however, that he was not aware of weather conditions in the area where the plane was descending, and that he asked the pilot what he intended because he was concerned whether the plane was in VFR conditions.⁹ *Id.* at 76-77.

⁸ The controller had both radar and radio contact with the plane. The data block on his radar screen displayed the plane's assigned altitude of 5,000 feet, its actual altitude, and its precise location in relation to Pittsburgh and Nemacolin airports and the Indian Head, Pennsylvania, VORTAC radio navigation facility. An arrow next to the altitude reading indicated whether the plane was ascending or descending. The data block was revised at ten second intervals by computer.

⁹ Appellants contend that the controller was negligent because he did not request a pilot weather report ("PIREP") from the plane. The district court found that the controller had a general duty to solicit PIREPs, but not to solicit them from the pilot of the decedent's plane. App. at 40-41, ¶ 10. I agree with the majority that this finding is not clearly erroneous. Controllers must request PIREPs when current or forecast weather conditions include ceilings at or below 5,000 feet, visibility of no more than five miles, thunderstorms, turbulence, or icing. Controller's Manual, *supra* note 4, at ¶ 81(a). The *Controller's Manual* does not require, however, that a controller ask for weather information from every pilot, as appellants' expert conceded at trial, app. at 227. Consequently

The controller knew also that the plane had not reported leaving its cruise clearance altitude of 5,000 feet, although such a report was necessary to cancel its cruise clearance. *See Controller's Manual, supra* note 4, at ¶ 32. Instead, the pilot stated "just standby with us, and, uh, we'll give you a call here in a minute." The district court found that the plane's failure to report its descent "indicates that its crew anticipated the possibility of not being able to land at Nemacolin Airport [sic] because of adverse weather conditions." App. at 35, ¶ 60. This finding, which militates against the Government's position, is plainly supported by the record.

The Government's air traffic control expert testified that if a pilot "deems it is safe to descend in VFR conditions, we have to assume he is descending in VFR conditions," that the radio transmissions were consistent with a normal descent, and that he would have to assume that the phrase "we are getting some ground contact" meant that the pilot was complying with the regulations and flying in VFR conditions. App. at 259-60, 267. By contrast, appellants' pilot expert and air safety expert both testified that the "ground contact" phrase meant that the plane was not operating in VFR conditions. App. at 106, 212-13.

Even accepting the district court's implicit judgment that the Government's expert was more credible than appellants' experts, the evidentiary support for the district court's finding is illusory. The testimony of the Government expert and the controller essentially was that the controller properly assumed that the plane was in VFR conditions because otherwise the pilots would be violating

the controller was not negligent for failing to solicit PIREPs from any particular pilot.

I note that the controller in this case did not request PIREPs from any aircraft even though some of the listed weather conditions were present. That failure, however, whether or not negligent, was not shown to be causally linked to the crash of the plane.

federal regulations.¹⁰ Yet the record clearly shows that except for the fact of descent, everything the controller knew or should have known, including the fact that pilots sometimes disobey regulations, app. at 87, indicated that the plane probably was not in VFR conditions. That the district court's finding is clearly erroneous is critical because a controller has substantially greater responsibilities when a plane is flying under instrument flight rules ("IFR"). Because a pilot cannot fly safely in IFR conditions using visual cues, the controller assumes the primary responsibility for keeping the aircraft at a safe altitude and a safe distance from other aircraft. See Federal Aviation Admin., U.S. Dep't of Transportation, *Airman's Information Manual*, pt. 1, at 1-62 to -68 (Aug. 1975); *Controller's Manual*, *supra* note 4, at ¶¶ 254-512.

The plane continued to descend for one minute after the controller's inquiry about the pilots' intentions and then flew at 2,600 to 2,700 feet for three minutes. Radar contact continued until the plane crashed into a 2,800 foot ridge, about two hundred feet below its peak. Had the controlled issued a low altitude alert, instructing the plane to climb immediately, after his last inquiry to the pilots, this accident could have been prevented. The district court found that the controller knew that area surrounding Nemacolin Airport is mountainous, with peaks of 2,900 feet, app. at 38, ¶ 78, although topographic information is not displayed on a controller's radar screen, *id.* at 37, ¶ 73. The court found also that the plane's descent was a normal descent, "which did not exhibit any significant or extreme deviations from what an air traffic

¹⁰ The Government's expert testified that the *Controller's Manual* "tells us that controllers are expected to believe the pilots comply with the regulations," app. at 259, but the only provision he could cite states only that pilots are required to obey the rules. His interpretation of this passage was that controllers were entitled to assume adherence. App. at 263, 264. As a matter of law, however, controllers' and pilots' duties of reasonable care are concurrent. See page 2 *supra*.

controller would expect from a plane descending from a cruise clearance to an airport." *Id.* at 38, ¶ 77. On the basis of these findings, the court concluded:

Because the air traffic controller in contact with Charlie Echo was entitled to assume the plane was operating in VFR conditions and, therefore, could see whatever terrain/obstructions were in his path, including mountains in the area, and, furthermore, because the flight path of Charlie Echo did not exhibit any significant or extreme deviations from what would normally be expected, he did not have a duty to issue a low altitude alert at any time during the descent of the plane.

App. at 40, ¶ 9.

While the district court's finding that the descent was normal is not clearly erroneous, its conclusion that the controller had no duty to issue a low altitude alert is mistaken. The controller was not entitled to assume that the plane was in VFR weather, as I have discussed, and the record shows that the plane was a "radar identified aircraft"¹¹ whose altitude was displayed on the controller's screen, and that the controller knew the terrain, the height of the peaks, and that the plane was descending. In view of the duty priorities established by the controller's manuals, I cannot conclude, as the majority does, that the controller had no duty to warn under the circumstances. Indeed, I think that the controller would have had a duty to warn even if the *Controller's Manual* did not require low altitude alerts, because the danger was "reasonably apparent," *American Airlines, Inc. v. United States*, 418 F.2d 180, 193 (5th Cir. 1969).

¹¹ "Radar identified aircraft" are all aircraft for which signals are displayed on a controller's radar screen. See *Controller's Manual* *supra* note 4, at ¶ 32.

In sum, the district court misconstrued the controller's duty of care, since the court did not recognize that pilots' and controllers' duties of care are concurrent, and clearly erred in finding that the controller was entitled to assume that the plane was descending in VFR weather. I believe that the controller was negligent because he failed to discharge his duty to issue a low altitude alert to the plane as it descended. The controller had a duty to warn, established by the *Controller's Manual*, because under the circumstances he was not entitled to assume that the plane's pilot was obeying the visual flight rules.

IV.

My concerns about the majority's disposition of this case transcend my belief that this case is wrongly decided. The standards of conduct for air traffic controllers are high because the safety of air travelers demands it. The degree of care that constitutes reasonable care under the circumstances is a function of the dangers that are fairly apprehended in those circumstances. A few seconds of inattention by a controller always makes possible a tragic, and too often fatal, accident. *See Himmller v. United States, supra*, 474 F. Supp. at 928. Because the Government, through air traffic control, has undertaken to promote safe air travel, pilots and especially passengers are entitled to rely on controllers' full performance of their exacting duties. *See Pierce v. United States, supra*, slip op. at 6. The FAA added issuing low altitude alerts to air traffic controllers' first priority duties because "[t]he public interest, in light of recent controlled flights into the ground, dictates that we amend our priority of duties to assist pilots in executing their regulatory responsibilities." Federal Aviation Administration Transmission to Area Offices 1 (June 2, 1975) (amending air traffic controllers' manuals), reprinted in app. at 202. That assistance was not given to the pilot

23a:

here, and the result was tragic for the completely innocent passengers as well as for the apparently negligent pilot.

I respectfully dissent.

A True Copy:

Teste:

**Clerk of the United States Court of Appeals
for the Third Circuit**

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 78-800

JOAN B. REDHEAD, et al.,
—versus— *Plaintiffs,*

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

August 12, 1981

**United States Courthouse
Pittsburgh, Pennsylvania 15219**

Before: HON. ALAN N. BLOCH, District Judge

Official Reporter:

THEODORE W. THOMAS

APPEARANCES

For the Plaintiffs:

Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
By: LAIDLER B. MACKALL, Esq.

For the Defendant:

GARY W. ALLEN, Esq.
Assistant Director, Torts Branch—Aviation
Department of Justice
P.O. Box 14271
Washington, D.C. 20044

PROCEEDINGS

THE COURT: In the matter of Redhead versus the United States of America, filed at Civil Action Number 78-800, the Court makes the following findings of fact:

1. This is an action for damages for wrongful death and survival brought pursuant to the Federal Tort Claims Act, 28 United States Code 2671, et seq. and the Michigan Wrongful Death and Survival Act. An administrative claim was presented to the Federal Aviation Administration, FAA, within the time period specified by 28 United States Code 2401(b) and was denied in writing on January 26, 1978.
2. Plaintiff, Joan B. Redhead, is a citizen, domiciliary and resident of the State of Michigan and the widow of Hugh McCullough Redhead, deceased, hereinafter referred to as "Decedent".
3. Plaintiff, National Bank of Detroit, is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in the State of Michigan.
4. Plaintiffs are co-executors of the estate of Decedent, having been so appointed on December 3, 1975, by the Probate Court for the County of Oakland, Michigan, Administration Number 1213495.
5. Decedent died in the crash of a Rockwell Turbo Commander 690A aircraft, N847CE, hereinafter referred to as "Charlie Echo," into Sugarloaf Mountain near Nemacolin on September 12, 1975.
6. Decedent did not bring an action for his personal injuries during his lifetime.
7. The FAA is an agency of the Defendant, United States of America, hereinafter referred to as "United States".

8. On September 12, 1975, Charlie Echo was to fly from the Detroit area to Nemacolin, Pennsylvania, with an intermediate stop for passenger pickup at Pittsburgh.

9. Charlie Echo was a pressurized, twin-engine, turbo-prop aircraft. It carried a full complement of radio navigational equipment for flight under instrument flight rules, IFR, as well as complete sets of flight instruments for both the pilot and co-pilot; included within this equipment were three altimeters, two were barometric altimeters, one for each pilot, which indicate the aircraft's altitude above mean sea level, MSL, the third was a radar altimeter, which indicates altitude above ground level, AGL, by bouncing a reflective signal off the terrain beneath the aircraft.

10. Charlie Echo was owned by Campbell-Ewald Advertising Company, whose principal place of business is in the State of Michigan.

11. The crew members of Charlie Echo were certified in accordance with FAA regulations.

12. Charlie Echo's pilot, Richard S. McAuley, held an airline transport pilot's certificate, with airplane multi-engine land and commercial privileges; his first class medical certificate was issued on May 27, 1975; he had accumulated 4,891 flight hours as of September 1, 1975, the last entry in the pilot's log book; compliance with Federal Air Regulation 61.57 was accomplished by him on October 24, 1974.

13. Charlie Echo's co-pilot, James E. Rhea, held an airline transport pilot's certificate, and he had 5,000 total flight hours as of October 3, 1974; his first class medical certificate was issued on October 3, 1974.

14. In April, 1975, both crew members completed a pilot familiarization and checkout course in the Rockwell Turbo Commander 690A.

15. Charlie Echo was certified in accordance with FAA regulations and requirements.

16. The gross weight and center of gravity of Charlie Echo were within prescribed limits during takeoff from Pittsburgh, and during the approach to Nemacolin.

17. The flight plan filed at Greater Pittsburgh, Pennsylvania Airport by the pilot of Charlie Echo indicated fuel on board as three hours thirty minutes, flight time from Pittsburgh to Nemacolin estimated at twenty minutes, true airspeed 270 knots, and the aircraft had area navigation equipment and transponder with 4096 code capability.

18. The flight of a general aviation aircraft may be conducted under either one of two different sets of flight rules, visual flight rules, VFR, or instrument flight rules, IFR.

19. Under VFR, a pilot directs his aircraft according to what he can see, navigating from place to place according to visual cues outside his aircraft.

20. Under IFR, pilots are not presumed to be able to see either other aircraft or the ground and are directed, therefore, by the air traffic controllers. A pilot flying by IFR must file an IFR flight plan, indicating his destination, proposed route of flight and requested altitude; control of the aircraft is maintained by reference to various instruments aboard the aircraft, and navigation is accomplished through various electronic navigational aids aboard the aircraft, which receive and interpret data broadcast from ground stations.

21. A pilot flying in VFR conditions must comply with certain FAA regulations specifying minimum visibility requirements. A pilot flying in IFR conditions may fly through clouds without any outside visibility whatsoever.

22. Controlled airspace is airspace within the jurisdiction of the air traffic controllers. Uncontrolled airspace is

airspace beyond the jurisdiction of the air traffic controllers.

23. Pilots flying under VFR conditions in controlled airspace must maintain a forward visibility of three miles and, in addition, must fly at least 500 feet below the nearest clouds, 1,000 feet above the nearest clouds and 2,000 feet from clouds horizontally on either side. Pilots flying under VFR conditions in uncontrolled airspace must maintain a forward visibility of one mile and remain free of clouds.

24. Some airports have a published instrument approach procedure designed by the FAA for use by pilots in landing. An instrument approach procedure positions the aircraft for a safe landing; however, no landing can be made unless the pilot can see the airport runway.

25. An aircraft flying under IFR conditions to an airport without an instrument approach procedure lands, instead, pursuant to a cruise clearance.

26. A cruise clearance authorizes a pilot to fly at any altitude within a certain block of airspace. This block is defined, at its upper level, by the terms of the cruise clearance and its lower level by the minimum enroute altitude, MEA, or the minimum obstruction clearance altitude, MOCA, which is that altitude at which it is safe to fly. The cruise clearance further authorizes a pilot to descend below the MEA and MOCA and approach and land at a destination airport if he is able to fly under VFR conditions.

27. An approach and landing made pursuant to a cruise clearance is made at the discretion of a pilot, without any necessary further contact from an air traffic controller.

28. The issuance of a cruise clearance does not indicate that the air traffic controller will exercise control over a descent or landing into uncontrolled airspace.

29. On September 12, 1975, Charlie Echo flew from Pittsburgh, towards Nemacolin Airport pursuant to an instrument flight plan approved by Defendant's, FAA, employees.

30. Prior to filing the flight plan, at about 1118 Eastern Daylight Time, EDT, 1518 Greenwich Mean Time, GMT, the pilot received a weather briefing, covering current weather conditions and forecasts for the five aviation weather reporting stations nearest to Nemacolin Airport.

31. Nemacolin Airport does not have a weather reporting station.

32. The weather on September 12, 1975, was generally poor, although improving, with low ceilings and low visibility within the area of the five closest weather reporting stations to Nemacolin, including the area from Pittsburgh to Nemacolin.

33. The weather observer who briefed the pilot of Charlie Echo on weather conditions prior to the flight commented to him, "That isn't the best place to be going this morning."

34. However, the fact that the weather was generally poor in this area does not preclude the possibility of better conditions at a particular location, such that a plane could fly in VFR conditions.

35. The Nemacolin Airport is an uncontrolled airport.

36. Airspace below 1,200 feet above ground level is uncontrolled airspace. Airspace above 1,200 feet is controlled airspace.

37. The Nemacolin Airport does not have an approved instrument approach procedure.

38. However, pilots for the Rockwell Corporation had developed an unofficial map or chart, which Rockwell pilots utilized to navigate to Nemacolin Airport.

39. Prior to the flight of Charlie Echo from the Pittsburgh Airport towards Nemacolin on September 12, 1975, the pilot of the plane received a copy of the Rockwell chart from a Rockwell pilot.

40. This chart indicated a path from Pittsburgh to Nemacolin by way of the Indianhead VOR. A VOR or VORTAC is a radio navigational aid, which emits a radio signal capable of being received by a plane's instruments. For navigational purposes, planes make use of the signal at each degree of the compass or 360 degrees. A plane can thus navigate from one point to another by setting its instruments on a path corresponding to a particular radio signal or radial.

41. From the beginning of its flight from Pittsburgh to the time it passed from radar and radio contact, the progress of Charlie Echo was monitored by a single air traffic controller located in the Cleveland Center, Cleveland, Ohio.

42. About five minutes after Charlie Echo left Pittsburgh on its way to Nemacolin, the crew requested and received an amended IFR flight plan to Nemacolin via the Indianhead VOR from the air traffic controller with whom they were in contact.

43. Approximately nine minutes after departing Pittsburgh, Charlie Echo requested and received a cruise clearance from this same air traffic controller.

44. The air traffic controller issued a cruise clearance to Charlie Echo of 5,000 feet MSL.

45. Air traffic controllers must issue cruise clearances upon request; they may not decline the request based on concern over weather conditions.

46. The MEA and MOCA from Pittsburgh to Nemacolin are both 5,000 feet MSL.

47. Because the cruise clearance and the MEA and MOCA were all the same, Charlie Echo was required to

fly at 5,000 feet MSL, descending below that to land only if VFR conditions prevailed.

48. An air traffic controller monitors the progress of a flight on a radar screen. Adjacent to the position of an aircraft on this screen is supplied an altitude data block, which indicates to the controller both the assigned altitude of the plane and the actual altitude of the plane.

49. At 1555:29, Greenwich Mean Time, GMT, on September 12, 1975, after Charlie Echo had descended below 5,000 feet, the air traffic controller in contact with the plane transmitted the following message, "What are your intentions?"

50. At 1555:33 GMT, Charlie Echo responded, "We just take a look. We are getting some ground contact here, and I think we are going to make it, but, ah, just stand by with us, and we will give you a call here in a minute."

51. At the time of this transmission, Charlie Echo reported an altitude between 3,300 and 3,400 feet MSL.

52. At 1555:45 GMT, Charlie Echo transmitted the additional message, "If we miss contact, I got, ah, 800 number to call flight service. I will get them on the phone right away."

53. At 1555:52 GMT, the aircraft controller asked Charlie Echo to repeat the message.

54. At 1555:54 GMT, Charlie Echo responded, "Yeah, if we lose radio contact with you and we make the ap, the landing, okay, I have got a 800 number to call to cancel it."

55. At 1558:55 GMT, the air traffic controller lost radar and radio contact with Charlie Echo.

56. At the time of all these transmissions, Charlie Echo was making a continuous, gradual descent from its 5,000 foot cruise clearance. The descent ended at about

1556:19 GMT, after which the aircraft flew essentially level, between 2,600 and 2,700 feet MSL.

57. All transmissions from Charlie Echo were made in a calm manner, which did not indicate any anxiety or fear on the part of the crew.

58. Charlie Echo crashed at approximately 2,600 feet MSL at about 1558:19 GMT, killing both pilots and both passengers instantly.

59. An FAA Advisory Circular on the subject of cruise clearances specifies, "Once a pilot starts descent and reports leaving an altitude in a cruise clearance block, he may not return to that altitude without additional air traffic controller clearance. If a pilot does not report descent from a particular altitude, he is, pursuant to the cruise clearance, free to climb and descend within the block at his discretion."

60. The fact that Charlie Echo did not report descent from the cruise clearance of 5,000 feet MSL indicates that its crew anticipated the possibility of not being able to land at Nemacolin Airport because of adverse weather conditions, thus being forced to return to the 5,000 foot MSL altitude. By not reporting its descent, Charlie Echo preserved its ability to return to the 5,000 foot MSL altitude.

61. The statement of Charlie Echo's crew that they were getting some ground contact indicates that they were able to look down from the plane and glimpse the ground through occasional breaks in the clouds.

62. This statement does not indicate, one way or another, whether Charlie Echo was flying with that visibility required for a plane to operate in VFR conditions.

63. The precise weather conditions being experienced by the crew of a particular airplane at a particular place cannot be ascertained by an air traffic controller by his radar screen.

64. The precise weather conditions experienced by a particular airplane at a particular place can only be known by its crew.

65. The air traffic controller in contact with Charlie Echo could not have known whether it was flying under IFR or VFR conditions by looking at his radar scope.

66. An air traffic controller is directed to solicit weather information from pilots when one of five conditions exist, including when ceilings are at or below 5,000 feet and when visibility, surface or aloft, is at or less than five miles.

67. The solicitation of weather information from pilots is an "additional service" to be performed by air traffic controllers after the performance of their first and second priority duties.

68. An air traffic controller solicits weather information from a pilot in order to pass that information to other pilots approaching the area and not to determine if a particular pilot is in IFR or VFR conditions.

69. The air traffic controller in contact with Charlie Echo did not solicit weather information from any pilots, including the pilot of Charlie Echo from 1541:06 to 1612 GMT on September 12, 1975; however, weather information was offered by some pilot to the controller.

70. Even if the controller was required to solicit weather information from pilots, generally, he was not required to solicit weather information from Charlie Echo at the particular time such information may have indicated whether or not Charlie Echo was flying in VFR conditions.

71. An air traffic controller is entitled to assume that a pilot is observing Federal Air Regulations.

72. The air traffic controller was entitled to assume that Charlie Echo was flying under VFR conditions be-

cause it descended and its crew would have known that they could not descend unless they were in VFR conditions according to Federal Air Regulations.

73. Information concerning the terrain over which a plane is flying is not displayed on the radar screen of an air traffic controller. Sectional maps showing the topographic features of the area within the jurisdiction of an air traffic controller are available, however, in an air traffic control center.

74. Air traffic controllers do not have a duty to regularly consult with the sectional maps to track the progress of a particular airplane; they have a duty to be generally familiar with the topographic features of the area within their jurisdiction.

75. An air traffic controller is required to issue a "low altitude alert" to radar identified aircraft if an automatic altitude report is observed on radar showing the aircraft to be in unsafe proximity to terrain/obstructions in the judgment of the controller.

76. The FAA "Enroute Traffic Control Manual," which governs the performance of air traffic controllers provides, "The provision of this service is contingent upon the capability of the controller to observe the unsafe altitude condition. The relative analysis of position and altitude in relation to terrain and obstruction, along with continuous monitoring of the aircraft target and information, TAG, cannot be mandated. Nonetheless, an awareness of significant or extreme deviation can be expected on a reasonable though intermittent basis in each case. In summary, because of the many factors affecting the ability to observe on radar a situation in which unsalfe proximity to terrain/obstruction may be developing, this paragraph does not impose a duty to see the development of such situation; it does require, however, that, when such a situation is observed, the pilot be so advised."

77. The descent of Charlie Echo, as observed by the air traffic controller, was a normal descent, which did not exhibit any significant or extreme deviations from what an air traffic controller would expect from a plane descending from a cruise clearance to an airport.

78. The air traffic controller in contact with Charlie Echo knew the area surrounding the Nemacolin Airport was mountainous, with a peak of 2,900 feet.

79. However, the mountains would not prevent a pilot from landing at Nemacolin in VFR conditions.

* * * *

From these findings of fact, the Court makes the following conclusions of law:

1. Under the Federal Tort Claims Act, the United States assumes responsibility for the negligent acts and omissions of its agents and employees acting in the course of their employment where a private person, under the same circumstances, would be liable to a claimant.

2. Under the Federal Tort Claims Act, the Court will apply the local law of the place where the act or omission complained of occurred. This Court has determined that application of Ohio's choice of law principles require it to apply Michigan law as the state with the most significant interest in the outcome of litigation.

3. Under Michigan law, negligence is conduct involving an unreasonable risk of harm. The elements of a negligence action are the existence of a duty owed by the defendant to the plaintiff and a breach of that duty, injury and a causal connection between the breach of the duty and the injury.

4. The air traffic controller in contact with Charlie Echo on September 12, 1975, had a duty to exercise reasonable care in monitoring the flight path of Charlie Echo and in providing direction and advice to its pilot.

5. Under the circumstances of this case, this duty consisted primarily of providing separation from other aircraft.
6. Plaintiffs do not contest that the air traffic controller in contact with Charlie Echo discharged this duty.
7. The air traffic controller in contact with Charlie Echo also discharged his duty of exercising reasonable care by issuing a cruise clearance to Charlie Echo, which would have enabled him to cruise at a safe altitude and permitted descent only if the pilot were in VFR conditions.
8. Because the air traffic controller in contact with Charlie Echo was entitled to assume Charlie Echo was flying in VFR conditions, he did not have an independent duty to inquire whether Charlie Echo was flying in VFR or IFR conditions.
9. Because the air traffic controller in contact with Charlie Echo was entitled to assume the plane was operating in VFR conditions and, therefore, could see whatever terrain/obstructions were in his path, including mountains in the area, and, furthermore, because the flight path of Charlie Echo did not exhibit any significant or extreme deviations from what would normally be expected, he did not have a duty to issue a low altitude alert at any time during the descent of the plane.
10. The air traffic controller in contact with Charlie Echo on September 12, 1975, had a duty to solicit pilot weather reports from the planes with whom he was in contact at various times throughout his watch so as to adequately inform himself about prevailing weather conditions; however, he did not have an independent duty to solicit a pilot weather report from the crew of Charlie Echo at the time at which it might have indicated to him that Charlie Echo was not flying in VFR conditions.

Wherefore, judgment is entered in favor of the defendant and against the plaintiff.

Court will adjourn.

(At 3:40 p.m. o'clock, the entitled matter was adjourned.)

I hereby certify the foregoing as a true and correct transcript of proceedings in the entitled matter.

/s/ Theodore W. Thomas
THEODORE W. THOMAS
1023A U.S. Courthouse
Pittsburgh, Pennsylvania 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2625

JOAN B. REDHEAD, Individually and as Co-Executrix of
the Estate of Hugh McCulloch Redhead Deceased and
the NATIONAL BANK OF DETROIT, Co-executor of the
Estate of Hugh McCulloch Redhead, Deceased,

Appellants

vs.

UNITED STATES OF AMERICA

(D.C. Civil No. 78-0800)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and BECKER,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on April 26, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 13, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

August 6, 1982

Certified as a true copy and issued in lieu of a formal
mandate on September 10, 1982.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for
the Third Circuit.

Cost taxed in favor of appellee as follows:

Brief	\$171.60
Total	<u>\$171.60</u>

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2625

JOAN B. REDHEAD, Individually and as Co-Executrix of
the Estate of Hugh McCulloch Redhead, deceased, and
the NATIONAL BANK OF DETROIT, Co-Executor of the
Estate of Hugh McCulloch Redhead, deceased,

Appellants

v.

UNITED STATES OF AMERICA

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge* and ALDISERT, ADAMS,
GIBBONS, HUNTER, WEIS, GARTH, HIG-
GINBOTHAM, SLOVITER and BECKER, *Cir-
cuit Judges*.

The petition for rehearing filed by Appellants in the
above entitled case having been submitted to the judges
who participated in the decision of this court and to all
the other available circuit judges of the circuit in regular
active service, and no judge who concurred in the deci-
sion having asked for rehearing, and a majority of the
circuit judges of the circuit in regular active service not
having voted for rehearing by the court in banc, the peti-
tion for rehearing is denied.

By the Court,

/s/ [Illegible]
Judge

Dated: Sep. 2, 1982

STATUTES AND REGULATIONS

Federal Aviation Act of 1958 § 307, Pub. L. 85-726, 72 Stat. 749, 49 U.S.C. § 1348:

(a) The Administrator [of the Federal Aviation Administration] is authorized and directed to . . . assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft

...

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, . . . including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft

Federal Aviation Act of 1958 § 601, Pub. L. 85-726, 72 Stat. 775, 49 U.S.C. § 1421:

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

...

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Federal Aviation Administration, En Route Air Traffic Control Manual (as revised September 12, 1975):

1. WORD MEANINGS

As used in this manual, the following have the meaning shown:

- a. "*Shall*," or an action verb in the imperative sense, means a procedure is mandatory.

• • •

55. DUTY PRIORITY

Give first duty priority to separation of aircraft as required in this handbook and to the issuance of low altitude alerts to radar identified aircraft if an automatic altitude report is observed on radar showing the aircraft to be at an altitude which in your judgment, places the aircraft in unsafe proximity to terrain/obstructions.

55A. LOW ALTITUDE ALERT

Low Altitude Alert.

Immediately issue a low altitude alert to a radar identified aircraft if you observe an automatic altitude report on radar showing the aircraft to be at an altitude, which in your judgment, places the aircraft in unsafe proximity to terrain-obstructions.

Phraseology:

(Ident) **LOW ALTITUDE ALERT. ADVISE YOU CLIMB IMMEDIATELY.**

78. FAMILIARIZATION

Become familiar with pertinent weather information when coming on duty and stay aware of current weather information needed to perform air traffic control duties.

80. PILOT WEATHER REPORTS (PIREPs)

When pilots offer information on weather conditions encountered, treat such information as follows:

43a

- a. Relay significant PIREP information to other aircraft . . . as soon as possible.

. . .

81. PIREP INFORMATION

- a. Solicit PIREP weather reports from pilots when one or more of the following conditions exist or are forecast for the area:

(1) Ceilings at or below 5000 feet.

(2) Visibility (surface or aloft) at or less than 5 miles.

. . .

Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L STEVENS,
CLERK

No. 82-908

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOAN B. REDHEAD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-908

JOAN B. REDHEAD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, the widow and executors of the estate of an individual killed in an airplane crash, contend that the court of appeals erred in affirming the judgment of the district court that an air traffic controller was not negligent in failing to issue a low altitude alert and thus allowing the pilot to attempt a landing.

1. The pertinent facts are stated in the opinion of the court of appeals (Pet. App. 2a-4a). Petitioners' decedent was a passenger in a twin-engine turboprop private plane that crashed into Sugarloaf Mountain near Nemacolin, Pennsylvania, on September 12, 1975, killing the pilot, co-pilot and the two passengers. The plane was en route from Pittsburgh to the Nemacolin airport, which is uncontrolled and does not have an instrument approach procedure approved by the Federal Aviation Administration. The airport is located at an elevation of 2,000 feet above sea

level; surrounding mountains reach 2,900 feet. The weather on the date of the crash was generally poor, with low ceilings and limited visibility, but was improving.

After leaving the Pittsburgh airport, the pilot flew under instrument flight rules and was in radar contact with an air controller located in Cleveland, Ohio. Approximately nine minutes after takeoff, the crew requested and received a cruise clearance of 5,000 feet. Three minutes after this cruise clearance had been obtained, the decedent's aircraft descended to approximately 3,400 feet. When the air controller learned of this development from the altitude data block on his radar screen, he radioed the crew and asked "[W]hat are your intentions?" The crew replied, "We just tak'n a look[.] [W]e're getting some ground contact here, and I think we're gonna make it. But, uh, just standby with us, and, uh, we'll give you a call here in a minute" (Pet. App. 4a). The plane gradually descended until it leveled off at about 2,600 feet. Two minutes later the controller lost radar contact with the plane. The next day the plane was located; it had crashed into a hillside at approximately 2,600 feet above sea level.

2. Petitioners sued the United States for damages under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, claiming that the plane crash was caused by negligence of the air traffic controller: *i.e.*, his failure to direct the pilot of the plane to return to a safe altitude rather than attempting to land under marginal weather conditions. After a trial, the district court determined that the air controller had not acted negligently (Pet. App. 24a-37a). The court reasoned that, contrary to petitioners' contention, the air controller did not have a duty to issue a "low altitude alert" during the plane's descent because the controller was entitled to assume that the plane was operating under visual flight rules and could see the terrain, including the mountains in the area, and because the flight path of the plane did not

exhibit any significant or extreme deviations from what would normally be expected (*id.* at 36a).

A divided court of appeals affirmed (Pet. App. 1a-23a). The court of appeals acknowledged (*id.* at 6a) that the United States could be held liable concurrently with the pilot if air traffic controller negligence was a proximate cause of the accident, but it sustained the trial judge's determination that in the circumstances of this case the controller was not negligent.

Petitioners contended that the controller should have determined from the crew of the ill-fated plane or other sources the actual weather conditions in the area where the plane was located just before the crash, and based upon that information, should have directed the pilot to return to an altitude of 5,000 feet and not to attempt a visual landing. The court of appeals determined, however, that this contention was inconsistent with the relevant principles respecting the duties of controllers as applied to the facts reflected in the record. The court noted that because of the variability of local weather conditions within a general area, the prevalence of relatively poor weather in the vicinity of an airplane does not necessarily preclude a safe landing under visual flight rules (Pet. App. 7a). The court also observed that the controller's only source of detailed weather information on the actual location of the attempted landing was the transmissions of the crew of the decedent's plane (*ibid.*). Based upon the expert testimony of a government witness (credited by the district court in preference to the contrary testimony of petitioners' witness), the court of appeals agreed with the trial court that under the prevailing weather conditions—which were not uniformly bad—the pilot's transmissions permitted the controller to assume that conditions were suitable for landing under visual flight rules (*id.* at 7a-8a). Because “[t]he controller was in no better

position to inform the pilot about the weather than the pilot was himself," and the pilot had "the * * * duty to keep the visual flight minimums necessary for a visual approach landing," the court concluded that the controller had violated no duty and that the cases relied upon by petitioners were distinguishable (*id.* at 9a-10a).¹

3. Further review is not warranted in this case. The issue presented is entirely fact-bound, for the decision below merely applies settled principles to the particular facts of this case. Indeed, the decision turns largely upon the district court's assessment of the relative credibility of opposed expert witnesses—a matter uniquely entrusted to the trier of fact. As the court of appeals remarked (Pet. App. 8a): "Assessing the testimony of the witnesses in this case depends largely upon their credibility. Although the [petitioners'] expert was helpful to their cause, the controller and the government's experts made out a case of non-liability which persuaded the trial judge."

Contrary to petitioners' contention (Pet. 8-9), the decision below does not conflict with the decisions of other courts of appeals respecting the independent duty of air traffic controllers to safeguard the lives of passengers. Nor does it establish any novel principle of "overriding federal importance" (Pet. 9). The court of appeals explicitly stated, consistent with petitioners' view of the law (Pet. App. 6a; citations omitted):

Both the pilot and the air traffic controller owe a duty of care to passengers in an airplane. Negligence by the pilot does not, in and of itself, absolve the government of liability. Each is responsible for the safe

¹Judge Becker dissented (Pet. App. 11a-23a). In his view, the record demonstrated that the controller should have suspected that the pilot was not adhering to the visual flight rules, and accordingly the controller was bound to issue a low altitude alert.

conduct of the aircraft and the safety of its passengers. Thus, there may be concurrent liability.

Stripped to its essentials, petitioners' argument thus rests upon imputation to the court of appeals of views that it squarely rejected (Pet. 8-9).² The balance of petitioners' argument (*id.* at 9-14) merely takes issue with the fact-bound concurrent determination of the courts below that the controller was not negligent in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

²Contrary to petitioners' assumption, the settled propositions that the controller's duty to passengers is independent of the pilot's, and that pilot negligence does not excuse controller negligence cannot possibly mean that information provided to the controller by the pilot must be ignored in determining whether the controller's conduct was negligent.